

## Against the Grain

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# Questions and Answers-Copyright Column

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# Questions & Answers — Copyright Column

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**QUESTION:** *Now that the HathiTrust case has been decided, what impact will it have on an academic library? Does the decision impact e-reserves at all?*

**ANSWER:** On October 10, 2012, the judge issued the opinion in *Authors Guild v. HathiTrust*, 2012 U.S. Dist. LEXIS 146169 (S.D.N.Y. 2012). From its Website, the **HathiTrust** is defined as: “a partnership of major research institutions and libraries working to ensure that the cultural record is preserved and accessible long into the future.” (<http://www.hathitrust.org/about#>). Open to institutions around the world, there are more than 60 partner libraries that make up the **HathiTrust**.

It is estimated that **HathiTrust** members have scanned more than seven million copyrighted works to date for the repository. In June 2011, the **University of Michigan** announced that it would make available to its students and faculty works from the corpus that it had determined were orphan works so they could access and download them. The university had established a protocol for searching for an author and posting the names of these works for 90 days in order to determine whether it would deem the work to be an orphan. Several other schools joined the project. In September 2011 the **Authors Guild** filed suit claiming that it had strong leads to authors and estates that hold copyright to the first 167 works listed by **Michigan** as orphan candidates. Then **Michigan** announced that it was suspending the program of determining which works were orphans, but it continues to host the seven million digitized works.

The litigation concerns whether an association can sue on behalf of its author members, and the judge answered that question in the negative. He also made a number of other interesting findings. (1) The scope of fair use is not limited by the section 108 library exceptions. (2) Search indexing is transformative and therefore is a fair use. (3) Libraries are not making commercial uses despite the fact they partnered with Google to obtain the digital copies. (4) Providing access for print-disabled individuals is fair use, and there is no market for such nor is one likely to develop. (5) There is no proof that **HathiTrust** is creating any security risks. (6) Defendant universities are

required to provide equal access to the print-disabled, which is allowed under section 121 of the *Copyright Act*.

The opinion has little effect outside of the Southern District of New York, and it has no impact on electronic reserves. Further, the **Authors' Guild** has announced that it intends to appeal the decision to the Second Circuit U.S. Court of Appeals.

**QUESTION:** *A photographic collection was donated to the library. May the library now reproduce items from the collection for posting on the Web? How should the photographs posted on the Web be attributed?*

**ANSWER:** If the donor owned the copyright to the photographs and if the copyrights were transferred to the library, the answer is yes. From the wording of the question, however, it appears that this was a simple transfer of ownership and not a written transfer of the copyrights as well. If the donation is fairly recent, it would be simple to go back to the donor and ask for a clarification of the ownership of the copyrights. Assignments of copyright must be in writing.

If the library does not own the copyrights, then it needs permission to post any of the photographs. It may get permission for the reproduction (posting) without owning the copyrights, but copyright ownership would be preferable. Assuming permission to post the photographs, proper attribution would be to the photographer with a note that the collection resides in the collection of the library.

**QUESTION:** *The library has received a donated item that is obviously a reproduction. May the library accept that copy and use it?*

**ANSWER:** Certainly, the library can accept the donation. Adding the item to the collection, however, is another matter. Libraries may add lawfully-acquired materials to their collections, but a copy that was a not a legitimate copy in the first place retains that status. Thus, adding it to the collection is problematic to the collection. The reason that a library might decide to accept such a donation even though it cannot add the item to the collection is to satisfy a donor. Most libraries have a policy to the effect that the library decides on a case-by-case basis whether donated items are added

to the collection and which items are sold or disposed of in another manner. So, accepting the donation and then disposing of the reproduced copy falls within this policy.

**QUESTION:** *An academic library is concerned about including art images in dissertations that reside in repositories or which are in the ProQuest database that is widely accessible to thousands of subscribers. Is such inclusion fair use?*

**ANSWER:** Including photographs in dissertations is no problem when the dissertation is just maintained in the university library. When it is put on the Web, however, it is published; the same is true with **ProQuest** availability. A good question to ask is if the dissertation were to be published by a university press, would the press require the author to seek permission? Most often the answer is yes.

The fact that some of these are photographs of works of art may make some difference if the underlying work is in the public domain. *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) held that exact duplication of paintings into transparencies was permitted because the underlying works were in the public domain and the photograph of that work had little originality and could not qualify for copyright protection on its own. So, if the photographs are of public domain paintings, inclusion of reproductions of the images is no problem. Photographs of three-dimensional works (like sculpture) may possess the requisite originality so that a photograph of even a public domain sculpture may qualify for copyright.

The “low-resolution” photograph cases really dealt with thumbnails, and it is likely that the photographs included in dissertations are more than thumbnails. It certainly may be fair use to include these, but there are no cases that say so. Accompanying the photograph with comment and criticism is important, but it will not necessarily insulate the use of the photograph from copyright infringement.



## Rumors from page 54

at **UNC-Charlotte**! During the Conference, we (**Tom Gilson**, **Jack Montgomery** and I) had the pleasure of interviewing **Chuck's** fantastic boss, **Stanley Wilder** (mentioned above in **Meg White's** panel). The **ATG**

**Penthouse Interviews** are all emerging online at <http://www.against-the-grain.com> and <http://www.katina.info/conference>.

Had a great email from **Alena Ptak-Danchak** who said she was so sorry to have to miss the **2012 Charleston Conference**. **Alena** had to attend a workshop in Thailand which unfortunately took place at the same time as **Charleston**! She says she will see us next year

for sure! **Alena** is Keeper of Scientific Books and Head of Bodleian Science and Medical Libraries at the **Radcliffe Science Library**. What a great title — keeper of Scientific Books! <http://www.bodleian.ox.ac.uk/science>

The live-wire **Susan Campbell** sent word that her last day of work was Friday, December 28. **Susan** is moving to a new house in the

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